APPENDIX 1

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 1074 **September Term, 1973**

(Argued April 25, 1974 Decided July 8, 1974)

Docket No. 74-1434

Donald Wallace, *et al.*,
Plaintiffs-Appellees,

v.

Michael Kern, *et al.*,
Defendants-Appellants.

Before: Lumbard and Hays, Circuit Judges;
Jameson, District Judge.*

Appeal from an order of the United States District Court for the Eastern District of New York, Orrin G. Judd, *Judge*, granting appellees' motion for preliminary injunction and ordering that inmates in the Brooklyn House of Detention for Men under indictment in the Kings County Supreme Court be permitted to demand trial after six-months pretrial incarceration (nine months

---

*Honorable William J. Jameson, Senior District Judge for the District of Montana, sitting by designation.

in the case of inmates accused of murder) and be released on their own recognizance if not brought to trial within 45 days of their demand.

Reversed and vacated.

Hillel Hoffman, Assistant Attorney General of the State of New York, New York, (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, on the brief, Joel Lewittes, Assistant Attorney General, of counsel), *for defendants-appellants.*

Stephen M. Latimer, New York, New York, Daniel L. Alterman, Center for Constitutional Rights, New York, New York (James Reif, National Lawyers Guild, New York, New York, Alvin Bronstein, Nancy Crisman, National Prison Project, Washington, D.C., Robert Boehm, William M. Kunstler, Center for Constitutional Rights, New York, New York, on the brief), *for plaintiffs-appellees.*

Pierce Gerety, Jr., New York, New York (Robert Kasanof, William Gallagher, New York, New York, on the brief), *for Legal Aid Society, as Amicus Curiae.*

Robert Plotkin, Washington, D.C., on the brief, *for the National Legal Aid and Defender Association as Amicus Curiae.*

Hays, *Circuit Judge:*

In July 1972 a committee of inmates awaiting trial or sentencing in the Brooklyn House of Detention for Men brought a class action pro se in the District Court for the Eastern District of New York. The defendants were six individual Justices of the New York Supreme Court, all of whom presided in criminal cases in Brooklyn. The Plaintiffs alleged that the district court had jurisdiction under 28 U.S.C. §1343 (1970). In substance, they prayed for interlocutory and permanent relief under Section I of the Civil Rights Act of 1871, 42 U.S.C. §1983 (1970), restraining the defendant Justices from violating inmate rights guaranteed by the federal Constitution.[1]

A week after the action was commenced, Judge Weinstein dismissed all claims relating to errors in the cases of individual prisoners on the authority of *Younger v. Harris,* 401 U.S. 37 (1971), and all claims relating to individual Justices as matters more appropriately resolved by local political processes. Nonetheless, he found that the complaint stated a core of facts going to the prompt and fair disposition of criminal cases in Brooklyn, and going to the condition and treatment of inmates in the House of Detention. He subsequently appointed counsel of the inmates' choosing to aid in presenting their side of the difficult jurisdictional and substantive issues presented by the case.

The prisoners by their appointed counsel filed an amended complaint in October 1972, and a second amended complaint in January 1973. Judge Weinstein disqualified himself, and the case was assigned to Judge Judd. The second amended complaint stated the same eight claims for relief as in the first amended complaint and also alleged cruel and unusual punishment by reason of lengthy pre-trial delays, and denial of equal protection because the plaintiffs were indigent. All Justices of the Kings County Supreme Court and various other court and city officials were joined as defendants.[2] Judge Judd denied the defendants' subsequent Rule 12(b)(6) motion to dismiss, except that he dismissed the claims relating to defendants other than the Supreme Court Justices.

In February 1973 the district court held a hearing on the plaintiffs' motion for preliminary injunction, taking evidence on the claims relating to pro se applications, Legal Aid Society representation, and pretrial delay. See note 2, supra. In March 1973 the court granted class status to the plaintiffs.[3]

On May 10, 1973, the district court granted the plaintiffs' motion for preliminary injunction as to two of their claims, restraining the Clerk of the Kings County Supreme Court from refusing to place pro se applications on the court's calendar, and restraining the Legal Aid Society from accepting more than forty cases per lawyer, reserving decision as to the other six claims. The Legal Aid Society and the Justices of the Supreme Court appealed to this court, and on June 27, we reversed and vacated the district court's order:

> "In the case involving the Legal Aid Society we hold that the court has no jurisdiction under Section 1983 since the Society was not

> acting under color of state law. With relation to the order directed at the court personnel we hold that under the principle known as comity a federal district court has no power to intervene in the internal procedures of the state courts." *Wallace v. Kern*, 481 F.2d 621, 622 (2d Cir. 1973) (per curiam), cert. denied, 42 U.S.L.W. 3387 (Jan. 7, 1974) (citation omitted).

On July 20 and July 25, 1973, the district court held additional hearings on the plaintiffs' motion for preliminary injunction as to the speedy trial claim. A number of witnesses testified for the prisoners, including three of the prisoners and a psychiatrist at the House of Detention,[4] and Justice Vincent Damiani testified for the defendant Justices.[5] The district court granted the inmates' motion for a preliminary injunction, ironically, almost eight months after the hearing. It ordered that each prisoner detained while awaiting trial in the Kings County Supreme Court for more than six months (or more than nine months in the case of one accused of murder) be allowed to demand a trial, and be entitled to release on his own recognizance if not brought to trial within 45 days of his demand. The order provided that delays caused by the inmate would not toll the initial six or nine month period, but that such delays would toll the 45 days period following the demand for trial. The order further provided that notice of its contents should be posted in the various institutions holding persons awaiting trial in Kings County, and be distributed to each new prisoner upon his arraignment in the Kings County Supreme Court.

The Justices appealed. On April 2, 1974, we granted a stay of the preliminary injunction pending appeal.

We reverse and vacate the district court order.

I.

We have noted more than once in the past that funding, facilities and personnel in Kings County are chronically inadequate to the task of bringing criminal cases promptly to trial. *Wallace v. Kern*, supra; *Thorne v. Warden*, 479 F.2d 297, 299 n. 2 (2d Cir. 1973); see *United States ex rel. Frizer v. McMann*, 437 F.2d 1312, 1314-15 (2d Cir.) (en banc), cert. denied, 402 U.S. 1010 (1971). As of July 1973 there were over 700 persons named in indictments in the Kings County Supreme Court who had been in custody awaiting disposition of their cases for more than six months, 210 of whom had been in custody for more than a year. Lengthy pre-trial confinement continues to be the rule in Kings County, despite the reform measures outlined by Justice Damiani. See note 5, supra. By January 1974 there were still 398 inmates awaiting trial who had suffered more than six month's confinement. The time lapse from the date of arrest to the date of trial in run-of-the-mill cases has been as long as 27 months. Such delays contribute to overcrowding at the House of Detention, a facility with a rated capacity of 840 inmates, but which housed an average of 1,391 inmates during 1973, and an average of 995 inmates during January 1974.

Although we are "entirely sympathetic with the purposes which the district judge sought to accomplish by his order," *Wallace v. Kern*, supra, 481 F.2d at 622, we must reverse and vacate that order.

II.

The Supreme Court's most recent statement on the Sixth Amendment's guarantee of a speedy trial, and indeed its first

attempt to set out a definitive approach to speedy trial claims, is *Barker v. Wingo*, 407 U.S. 514 (1972). There the Court rejected the notion that the Sixth Amendment may be confined to a rigid set of rules. It held that as a matter of constitutional law the speedy trial right cannot be quantified into any specific period of time; that the Sixth Amendment does not require the state to bring a criminal defendant to trial within any specific time period.

In *Barker* the Court recognized the amorphous quality of the right to a speedy trial as well as its relative nature and its dependence on the circumstances of each case. Accordingly, the Court adopted an ad hoc balancing test under which the conduct of the prosecution is weighed against the conduct of the defense. In the course of balancing these relative circumstances, a court must consider four factors: the length of the delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant resulting from the delay. 407 U.S. at 530.

In the present case the district court gave lip service to the *Barker* methodology and criteria, but in fact it failed to account for the four *Barker* factors, and it ignored the mandate to proceed on a case-by-case basis.

As to the first factor, the length of the delay, the district court made no finding of fact and pointed to no rule of law to support its use of the curiously arbitrary six and nine month periods. *Barker* expressly rejects the notion that the Sixth Amendment can be quantified into a specific time period. The court must examine each particular delay, treating it as a "triggering mechanism." When and if there is a showing of "presumptively prejudicial delay," the court must extend its inquiry to a consideration

of the other three factors. The length of delay that will provoke such inquiry "is necessarily dependent upon the peculiar circumstances of the case." 407 U.S. at 530-31. For example, a delay that would be presumptively prejudicial in the case of a defendant accused of a simple street crime might be tolerable in the case of a defendant accused of participating in a serious and complex conspiracy. 407 U.S. at 531. The presumptively prejudicial period may be shorter in a case depending on the recollection of eyewitnesses than in a case depending on less perishable forms of evidence. See 407 U.S. at 531 n. 31. When it established its six month period, the district court failed to consider such unique factors as doubtless exist in the cases of individual pretrial detainees. It attacked the problem of calendar congestion in the Kings County Supreme Court with a blunt instrument. It fixed a uniform period of presumptively prejudicial delay, rather than undertake the fine, albeit difficult, case-by-case determination of whether a prejudicial delay exists as to any individual inmate.

The second of the *Barker* factors is "the reason the government assigns to justify the delay." 407 U.S. at 531. The district court in the present case did not inquire into the reason for delay specific to any given prisoner. It found only that the overcrowded criminal docket of the Kings County Supreme Court was the most frequent reason for trial delay. While it is clear that such overcrowding weighs against the state "since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant," 407 U.S. at 531, this factor alone is not a sufficient reason to impose a uniform six month speedy trial rule. The district court was required to balance the deplorable condition of court congestion against other factors present in the various individual cases.

As to the third *Barker* factor, whether the defendant has asserted his right, the district court's order requires the state to bring an accused to trial only after he has made a demand. In this regard, the order embodies the demand waiver rule which was repudiated by the Supreme Court in *Barker*. Under the district court order, a defendant who does not demand a trial can be tried at the state's dilatory convenience and will not be entitled to relief, regardless of how unreasonable the pretrial delay may be.

Finally, and perhaps crucially, the district court did not consider whether an individual defendant's period of pretrial confinement prejudices any of the three purposes of the Sixth Amendment: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." 407 U.S. at 532; *United States v. Ewell*, 383 U.S. 116, 120 (1966); *Smith v. Hooey*, 393 U.S. 374, 377-78 (1969). It reasoned that since under its order it did not dismiss the indictments of defendants not tried within 45 days of their demand, it need not consider whether the defense would be impaired. This line of reasoning is no substitute for the ad hoc balancing mandated by *Barker*. It is clear that prejudice to the defense goes to whether the Sixth Amendment right to speedy trial has been abridged, not to the type of remedy available to a defendant. For example, absent a specific showing of prejudice to the defense, a relatively long period of delay may be excused. In *Barker* the defendant was denied relief after a five-day delay, in part because his defense was not prejudiced by the delay.

This is not the proper business of the federal courts, which have no supervisory authority over the state courts and have no power to establish rules of practice for the

state courts. Rather, the federal courts must limit their inquiry to the specific facts regarding a complaining petitioner. Relief from unconstitutional delays in criminal trials is not available in wholesale lots. Whether an individual has been denied his right to a speedy trial must be determined ad hoc on a case-by-case basis.

FOOTNOTES

[1] The prisoners claimed, in effect, that Kings County bail procedures denied them equal protection of the law, that the Supreme Court's refusal to entertain pro se applications denied them due process of law, that lengthy pretrial and pre-sentencing delays evidenced a denial of their right to speedy trial, and that practices in identifying suspects and in obtaining indictments were contrary to state law.

[2] The second amended complaint alleged the following claims for relief:

1) that the case loads of Legal Aid Society attorneys were so great as to deny indigent inmates the effective assistance of counsel;
2) that excessive prosecutorial delay in presenting cases to the grand jury, excessive delay in bringing cases to trial, and excessive delay in preparing pre-sentence reports denied inmates their right to speedy trial;
3) that the King's County Supreme Court consistently set excessive bail;
4) that lengthy periods of pretrial incarceration deprived the inmates of liberty without due process of law;
5) that the court's practice of refusing to accept pro se applications from inmates who have been assigned Legal Aid counsel denied them due process of law;
6) that the Corrections Department's alleged practice of unnecessarily shuttling inmates between the House of Detention and the court house was designed to intimidate the inmates and induce them to plead guilty;

7) that various practices in the Supreme Court had the effect of intimidating inmates into pleading guilty rather than stand trial; and
8) that the above practices discriminated against indigents on account of their inability to make bail.

Of these claims for relief, only the second is involved in this appeal, and that only to the extent that it alleges pretrial delay.

[3] In granting class status, the district court established two subclasses: all detainees in the House of Detention under indictment, and all detainees not under indictment.

[4] The testimony of Barry Wilson was typical of the three inmates who testified. He stated that he had not come to trial after nearly eleven months of post-arrest incarceration. Bernard L. Segal, an attorney and a professor at Golden Gate University, testified that pretrial delay generally damages the prisoner in five ways: it denies a constitutional right, it prejudices the prisoner's economic and social interests, it has such adverse psychological effects as inducing anxiety, irritation and bitterness, it impairs the inmate's ability to aid his counsel in preparing his case, and it coerces the prisoner to accept less than the full measure of constitutional rights. Dr. Sheldon Cholst, a psychiatrist with the prison Health Service of the House of Detention, testified that lengthy pretrial delays of uncertain duration cause anxiety, uncertainty and resentfulness, and contribute to the fact that the suicide rate among inmates is 25 times higher than that of the general population. Samuel Dawson, Associate Attorney in Charge of the Brooklyn Supreme Court Office of the Legal Aid Society, testified that in a number of Criminal Parts, the most recent cases tried were not the oldest cases on the calendar. He said that the expansion of the Legal Aid Trial Parts had not resulted in speedier trials, and he predicted that the total number of trials in 1973 would be less than the total in 1972.

[5] Justice Damiani testified as to the steps taken by the Brooklyn Supreme Court to reduce its criminal backlog. The number of Trial Parts was increased by one-third. The court established Conference Parts to eliminate cases in which defendants are willing to plead guilty and instituted a digital system to eliminate fragmented representation by the Legal Aid Society. Judges have been assigned to

the House of Detention to conduct bail conferences, conferences which may be initiated by a defendant by writing an informal letter to the court. The Legal Aid Society caseload has been reduced to the limits set by Judge Judd's May 10 order, even though that order was vacated on appeal.

Donald Wallace
et al., v.
Michael Kern et al.

I concur

J.E.L.
July 2, 1974

Donald Wallace
et al., v.
Michael Kern, et al.

I concur

W.J.J.
6/21/74

APPENDIX 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT, NEW YORK

DONALD WALLACE, *et al.*, *Plaintiffs,*	:	
—against—	:	**72-C-898**
MICHAEL KERN, *et al.*, *Defendants.*	:	

ORDER

Plaintiffs having moved for a preliminary injunction to protect their right to a speedy trial; and the Court having heard the testimony offered by plaintiffs and defendants on July 20, 1973, and July 25, 1973; and the Court having considered the affidavits and other documentary proof submitted by the respective parties; and due deliberation having been had; and the Court having filed its written memorandum of decision dated March 7, 1974;

NOW, on the motion of Stephen H. Latimer and Daniel L. Alterman, attorneys for plaintiffs, it is ORDERED that the defendant justices of the Kings County Supreme Court and the Kings County District Attorney shall comply with the following provisions:

1. In the case of all persons who have indictments, other than for murder, pending in the Kings County Supreme

Court and who have been held for six calendar months or more in any institution under the care, custody, and control of the New York City Department of Correction or in the Ossining Correctional Facility, or in any other institution designated by the appropriate authority to house Kings County pretrial indictees, trial shall commence within forty-five days after submission of a written request for trial, *pro se* or by counsel, to the clerk of the Criminal Term of the Kings County Supreme Court, with a copy sent to the District Attorney.

In the case of all persons who have indictments for murder pending in the Kings County Supreme Court and who have been held for nine calendar months or more in any institution under the care, custody, and control of the New York City Department of Correction or in the Ossining Correctional Facility, or in any other institution designated by the appropriate authority to house Kings County pretrial indictees, trial shall commence within forty-five days after submission of a written request for trial, *pro se* or by counsel, to the clerk of the Criminal Term of the Kings County Supreme Court, with a copy sent to the District Attorney.

Request and motions for a speedy trial submitted prior to March 7, 1974, shall not be considered "written requests" for purposes of this Order. This Order shall apply to all persons presently under indictment, and to all indicted persons subsequent to March 7, 1974.

2. The trial of all those indictees who were and continue to be incarcerated for more than six or nine months as of March 7, 1974 shall commence in the manner directed in paragraph 1 in accordance with the following schedule:

Length of Incarceration	*45 Day Period Begins to Run*
(for all indictees)	
1 year	from March 7, 1974
9 months to 1 year	45 days from March 7, 1974 (April 21, 1974)
(for all non-murder indictees)	
6 months to 9 months	90 days from March 7, 1974 (June 5, 1974)

3. In the case of any incarcerated indictee who has submitted a request for trial in accordance with paragraphs 1 and 2, and whose trial has not commenced by the forty-fifth day, plus any periods excluded by the terms of this Order, the clerk of the Criminal Term shall forthwith notify the Department of Correction in writing of that fact and the defendant Department of Correction shall forthwith release the indictee from custody.

4. If, after submitting a request for trial, an indictee or his counsel requests an adjournment, the forty-five day period shall be tolled during the period of the adjournment only, but not for a period longer than the length of the adjournment requested by the indictee. In no event shall a request for an adjournment be considered a waiver of any of the other provisions of this Order. No adjournment on motion of the District Attorney or the court, without the indictee's in-court oral or written consent, shall toll the 45 day period, unless the indictee refuses to appear in court after being directed to do so.

5. Any waiver of any provision of this Order or any consent to an adjournment must be made by the indictee on the record in open court, or by written consent of the indictee. If the indictee is not present in court, nor has given his written consent, no provision of this Order may be waived by counsel, and no adjournment granted shall

toll the 45 day period. No defendant in this action shall, under any circumstances, require any person to waive any provision of this Order or to consent to any adjournment. Any delay caused by failure of the defendant Department of Corrections to produce the accused in court will not toll the 45 day period.

6. Notice of the provisions of this Order in the form annexed ("The Notice") shall be posted in every day room in each housing floor in the Brooklyn, Queens, Adolescent, Adult and Women's Houses on Rikers Island, Houses of Detention.

7. The notice shall be posted in a public place on every floor in every other institution which houses persons awaiting trial on indictments in Kings County Supreme Court. Only floors which house Kings County indictees shall be required to post said notice.

8. A copy of the notice shall be mailed by the clerk of the Criminal Term to every person under indictment in Kings County who is presently incarcerated in any institution other than those specified in paragraph 6.

9. The clerk of the Criminal Term shall give a copy of the notice to every person indicted in Kings County on the date of his arraignment on the indictment, if such person is remanded to an institution under the care, custody. and control of the defendant Department of Correction. Delivery of a copy of the notice to the person's attorney shall not be deemed sufficient.

10. Nothing in this Order shall be deemed to contradict the terms of any detainer or warrant lodged against the person submitting a request for trial.

11. If a person has more than one indictment pending in the Kings County Supreme Court the period of incarceration shall be deemed to run from the date of arrest of the earliest indictment, unless the later indictment(s) are for murder or for a crime allegedly committed while in custody. Any order granting release on recognizance which may be entered in compliance with the terms of this Order shall apply to all indictments pending against the individual.

12. Members of plaintiffs' staff shall be permitted to inspect the public areas and/or day rooms of any institution which houses Kings County indictees at any time during business hours, after reasonable notice to the wardens of said institutions, for the purpose of inspecting the placement of the notice.

13. There shall be excluded in counting the 45 day period after written request for a speedy trial, the period or periods of the pendency of other proceedings concerning the defendant such as those set forth in section 30.30 (a)(4) of the Criminal Procedure Law of the state of New York.

/s/ Orrin G. Judd
U.S.D.J.

March 26, 1974
Brooklyn, New York

APPENDIX 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

* * * * *

Appearances:

STEPHEN M. LATIMER, ESQ.

DANIEL L. ALTERMAN, ESQ.
JAMES REIF, ESQ.
ROBERT L. BOEHM, ESQ.
WILLIAM M. KUNSTLER, ESQ.
Center for Constitutional Rights

ALVIN J. BRONSTEIN, ESQ.
NANCY CHRISMAN, ESQ.
National Prison Project

Attorneys for Plaintiffs

HON. LOUIS J. LEFKOWITZ
Attorney General, State of New York
Attorney for State Defendants

BY: HILLEL HOFFMAN, ESQ.
Assistant Attorney General
Of Counsel

HON. NORMAN REDLICH
Corporation Counsel, City of New York
Attorney for City Defendants

BY: JOHN P. NACHAZEL, ESQ.
JEFFREY FRIEDMAN, ESQ.
Assistant Corporation Counsel
Of Counsel

MARY D. PICKMAN, ESQ.
Counsel for N.Y.C. Board of Correction
Amicus curiae

ROBERT HERMAN, ESQ.
Attorney for Legal Aid Society
Amicus curiae

JUDD, J.

MEMORANDUM OF DECISION

Plaintiffs in this class action have moved for a preliminary injunction to assure their right to a speedy trial or to release from custody.

Facts

The action is brought on behalf of all felony defendants confined at Brooklyn House of Detention for Men (BHD) pending indictment, trial or sentence. Among numerous rights which the action seeks to enforce is the constitutional right to a speedy trial for persons held in custody because of their inability to provide money bail. The second amended complaint asks for the dismissal of charges or the release on their own recognizance of all criminal defendants who have not been tried within six months after their commitment.

The problem of trial delays in Kings County Supreme Court is one of long standing. Trial delays in the metropolitan counties were described in 1971 as "notorious" and "chronic," in an opinion by the Second Circuit Court of Appeals. *United States ex rel. Frizer v. McMann*, 437 F.2d 1312, 1315. The same court noted in 1973 that serious delays continued. *United States ex rel. Thorne v.*

Warden, Brooklyn House of Detention for Men, _____ F.2d _____, May 16, 1973. The New York Legislature early in 1972 (L. 1972, c. 496, §1) enacted a finding that "there is an emergency of grave dimensions in the processing of felony charge cases in the criminal courts in the metropolitan counties of the state." The legislature appropriated $6,700,000 to be used, with federal and local funds, for an emergency felony case processing program.

In December 1972, there were 644 defendants who had been confined in BHD for more than six months. During the first three months of 1973, the Legal Aid Society obtained twelve acquittals of defendants who had been in jail for periods ranging from twelve to fourteen months. Four BHD inmates who testified in this court in April 1973, had been confined from thirteen to seventeen months awaiting trial.

On July 9, 1973, there were 707 persons named in indictments in Kings County Supreme Court who had been in custody for more than six months, and 210 of these had been in custody for more than a year. This represented almost 44 percent of the total 1,614 defendants in custody. Some of these were awaiting sentence, but the vast majority were awaiting trial.

A witness in *Valvano v. Malcolm*, 70-C-1390, testified in January 1974 that he had just been acquitted on a murder charge after being in jail in BHD for fourteen months. An affidavit for plaintiffs listed details concerning six inmates who had been held from eight to twenty months awaiting trial, in spite of an aggregate of fourteen speedy trial motions.

Trial delays are reflected in overcrowding of both BHD and QHD. Although the rated capacity of BHD is 840, it housed an average of 1,391 during 1973, or over 160 percent of capacity. Because of the overcrowding at BHD, there were 200 pretrial detainees on Kings County indictments housed in Queens House of Detention for Men (QHD), which was at 131 percent of capacity on July 9, 1973. Although both institutions were designed to hold one inmate in each cell, there was still double occupancy in almost all cells in QHD in January 1974 when the Warden testified before this court in the *Valvano* case. The occupancy of BHD had been reduced to 995 or about 125 percent of capacity by January 1974, but there was still double occupancy of a large proportion of the cells. The cells are approximately five feet by eight feet in dimensions.

The New York City Board of Correction in its *amicus curiae* brief cites a number of cases involving detainees, which serve to highlight the impact of lengthy pretrial confinement.

After being held in jail for twenty-two months, "W" pleaded guilty on June 13, 1973 to a robbery charge. He has been released on $250 bail, with the expectation that he would be placed on probation. His case had been marked marked ready and passed fifty-five times. While in jail, he was severely beaten by other inmates, and sustained a shoulder injury, from which he still suffers.

"M" was in jail for nineteen months before pleading guilty on June 14, 1973 to a robbery charge, at a time when he claimed to have lost contact with witnesses who might have aided him.

"Harold S." was in jail for twenty-one months and had attempted suicide during a period of despondency, before he finally pleaded guilty on June 29, 1973 to manslaughter.

"Herbert S." was in jail for sixteen months before pleading guilty on May 9, 1973 to third degree robbery. Only after his plea was he transferred to Rikers Island, where he received hospital treatment for swollen glands from which he had suffered for over six months.

"D" was in jail for eighteen months before obtaining a Wade hearing, which was followed by a guilty plea to a reduced robbery charge on June 19, 1973. In spite of his plea, he still maintains his innocence.

State Court Remedies

Efforts at relief in the state courts have been largely unsuccessful. Under the leadership of Chief Judge Fuld, the Administrative Board of the Judicial Conference on May 3, 1971 adopted a speedy trial rule, which would have required release after ninety days in custody without a trial, except in homicide cases. 22 NYCRR 29.1-29.7. This rule was not to become effective until May 1, 1972. Before then the legislature enacted its own plan, requiring only that the people be ready for trial within ninety days, the legislature stating that its enactment "shall be deemed to supersede any rule of the Administrative Board of the Judicial Conference." CPL §30.30, as amended by L. 1972, Chap. 184, effective April 28, 1972.

Following the enactment of Section 30.30, the Legal Aid Society attempted to secure the release of detainees in custody more than six months. William Gallagher, Director of Court Operations for the Legal Aid Society, testified that in the summer of 1972 the Society brought

400 speedy trial motions before the Appellate Division, Second Department, that the Acting Presiding Justice directed a conference with the District Attorney concerning bail, that a Supreme Court Justice released 202 defendants on their own recognizance or low cash bail, but denied the other motions, and that no trial dates were set for the other defendants.

After being unsuccessful in the Appellate Division, the Legal Aid Society took four test cases to the New York Court of Appeals, which on February 16, 1973 directed that the cases be granted a trial preference to assure the commencement of trial within three months thereafter. *People ex rel. Franklin v. Warden*, 31 N.Y.2d 498, 341 N.Y.S.2d 604. The Court said (31 N.Y.2d at 502-04, 341 N.Y.S.2d at 607-08):

> We recognize that the four cases now before us are typical of the vast pretrial felony backlogs in the County of Kings and perhaps to a lesser degree in other metropolitan counties.
>
> It may be urged that the disposition we make in the cases now before us is unfair to other detainees similarly situated in Kings County. We would only note that it does not appear that all or any of such other detainees actually desire to go to trial . . . The ultimate remedy must be provision by the appropriate branches of government of the material and personal resources required to handle a court burden increased and increasing. . . .

The obstacles to obtaining a speedy trial are aggravated by various practices in Kings County Supreme Court. (1) The District Attorney can pick any one of the first forty cases on the calendar in a part to bring to trial, while a defense counsel cannot be adequately prepared on more than a few cases at a time. While the Deputy Chief of the Supreme Court Bureau in the District Attorney's office testified that Legal Aid receives notice from forty-eight hours to a week before a case is brought to trial, the court finds that his directions to this effect are not generally followed. (2) Compensation to private attorneys assigned under Article 18-B of the County Law is still limited by statute to $15.00 an hour for court time and $10.00 an hour for out-of-court time; but even this amount is usually cut. They are thus discouraged from making speedy trial motions. The Administrator of the Indigent panel for the Second and Eleventh Judicial Districts testified that attorneys almost never receive the dollar amount requested on an hourly basis. (3) There is no provision for supervision of 18-B attorneys by any experienced attorney.

It may be noted, however, that the burden on the Legal Aid Society staff has been reduced since this court's order of May 10, 1973. Administrative Justice Vincent D. Damiani of the Criminal part, Kings County, testified on July 25, 1973 that Legal Aid was not being assigned new cases until the suggested standard of not more than forty felony cases per lawyer was met.

Under existing calendar practice, as described by Samuel Dawson, Associate Attorney in charge of the Supreme Court office of Legal Aid Society in Kings County, the fact that a case is marked ready and passed does not necessarily mean that the District Attorney is ready, but

is simply a formal method of compliance with the readiness rule.

"The system isn't working," according to Peter Purvis, Deputy Director of Operations for the Legal Aid Society. Everything is being done which the facilities permit, but defendants still are not being tried promptly.

Effects of Prolonged Pretrial Detention

Prolonged detention creates various types of harm for defendants. One problem is the inducement to plead guilty rather than wait for trial, as mentioned by Mr. Justice Thomas R. Jones in his testimony. Professor Bernard Segal of Golden Gate University testified that prolonged pretrial incarceration involves (1) loss of an irretrievable right to freedom, (2) lack of compensation for lost time if found innocent, (3) excessive anxiety and concern, (4) substantial impairment to the right of counsel, with a tendency to rely on other inmates as lawyers' visits become less frequent and less constructive, (5) personal hardship resulting from the inability to keep a job open and the strain on family relationships, and (6) coercion to accept a guilty plea rather than to claim a defendant's full constitutional rights or even to assert believable defenses. He pointed out that deterioration of a detainee accelerates materially after three months, with family visits becoming less frequent. Dr. Sheldon Cholst, a psychiatrist with the Prison Health Service at BHD, testified that prolonged pretrial confinement creates tremendous anxiety, a tendency to become hardened and embittered, a suicide rate 25 times as high as the general population, and twice as many breakdowns as the general population. There is no way of earning money at BHD, no cigarettes are supplied to people without funds, and there is pressure to enter

homosexual situations in order to obtain small amounts of money. According to Dr. Cholst, the psychological situation of state prisoners who know the length of their sentences is much better than that of detainees who are uncertain of the time or consequences of trial. The testimony of Professor Segal and Dr. Cholst was not effectively impeached or contradicted, and is accepted by the court as true.

Improvements to Date

The court has given full consideration to the fact that more than six months have elapsed since the close of the hearings. The necessary deliberation and preparation of this decision have been unduly delayed by an accumulation of other urgent motions and cases and by an almost continuous series of trials. The continuance of the problem is indicated by a number of facts, including the testimony received during January and February 1974 in two class actions involving inmates both at BHD and QHD. *Jenkins v. Malcolm,* 73-C-261; *Valvano v. Malcolm, supra.* Some of this testimony has already been mentioned.

The flow of speedy trial habeas corpus petitions to this court from Kings County defendants has continued during late 1973 and early 1974. The fact that they were filed *pro se*, by inmates who have counsel, appears to reflect a belief by counsel that state courts do not provide an effective remedy. The writer's share of such petitions has included at least four where pretrial confinement ranged from twelve to seventeen months, four others where the total period in custody has not been checked, and one which challenged a guilty plea as having been coerced by pretrial delay.

In fact, during the time this memorandum was being drafted, the District Attorney's office had just begun the trial of a defendant in custody since December 1972, whose trial after fourteen months was precipitated by an order of this court dated January 30, 1974 directing his release on his own recognizance unless his trial began before March 1, 1974. *United States ex rel. Jerome Perry v. Warden, Brooklyn House of Detention* (73-C-1666).

The number of criminal parts was increased during 1973 so that there are now thirty-one parts in the criminal term, some of them operating on a twelve-month basis. During 1973, the number of indictments in Kings County also decreased, a fact which should give an ultimate potential of reducing trial delays. Monthly meetings are held on overcrowding and trial delay, attended by the Administrative Judge for the Criminal Part in Kings County, the Administrative Judge for the Supreme Court in Staten Island, the Chief Probation Officer and representatives of the District Attorney's office, Legal Aid Society, the Correction Department, and ancillary services.

A current comment on the Criminal Calendar in Kings County is contained in "From the Editor's Desk" in the March 1974 issue of the *Brooklyn Barrister* (Vol. 25, p. 99):

> The Criminal Term Parts have no calendar numbers and the District Attorney is responsible for selecting and moving cases for trial. The office of the District Attorney has been obliged to increase its staff but even so seems to be unable to promptly move cases for trial. Judges willing and anxious to try cases must still await the pleasure of the District Attorney.

When this court's Law Clerk assigned to this case visited the Supreme Court on March 4, 1974, he examined the ready calendar for four parts. In three of the four parts, more than 50 percent of the cases marked ready involved indictments filed in 1972 or earlier. The figure for the fourth part was 48 percent. In the four parts, there were 105 pre-1973 cases awaiting trial, only 67 cases involving 1973 indictments, and only 4 involving 1974 indictments. This is an improvement from the situation a year ago as noted in this court's memorandum of May 10, 1973 (p. 6), but it still falls far short of speedy trials. Of the calendars for 28 parts examined, only one had a 1973 case at the top of the list.

The Law Journal listings for criminal cases in Kings County do not give calendar numbers for criminal cases, as they did a year ago, although calendar numbers are listed for all civil cases.

Chief Judge Charles D. Breitel has initiated steps which may be ameliorative by designating, in cooperation with the four Appellate Divisions, an Administrative Judge for the entire state, and by obtaining the concurrence of the First and Second Department Appellate Divisions in designating Justice David Ross as City Administrative Judge. N.Y.L.J. February 28, 1974, p. 4. It is impossible, however, to predict how long it may take the new machinery to correct conditions which have existed for a considerable period of time in Kings County Supreme Court.

Discussion

Over-long confinement without trial is a denial of constitutional rights. The Sixth Amendment right to "a speedy and public trial" is now applicable to the states. *Klopfer v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988 (1967).

"Speedy" is a relative word, which may properly be interpreted differentiy for one who is confined in jail than for one who is at large. Since an unconvicted defendant in a detention facility actually enjoys fewer amenities than a convicted prisoner in a correctional institution, over-long confinement without being convicted, simply for being poor, is also a denial of due process of law. *Rhem v. Malcolm*, 70-C-3962 (S.D.N.Y. 1974); *Inmates of Suffolk Co. Jail v. Eisenstadt*, 360 F. Supp. 676 (D. Mass. 1973); *Inmates of Milwaukee Co. Jail v. Petersen*, 353 F. Supp. 1157 (E.D. Wis. 1973); *Brenneman v. Madigan*, 343 F. Supp. 128 (N.D. Cal. 1972).

Defendants assert that relief cannot be given in this action until each individual defendant has exhausted his state rights. However, this is not the sole test under 28 U.S.C. §2254. Subdivision (b) specifies:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process *or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.* (Emphasis supplied).

As pointed out above with respect to the *Franklin* case, a year's effort by the Legal Aid Society resulted in only four prisoners being granted trial preferences effective after more than nine months of confinement. *People ex rel. Franklin v. Warden*, 31 N.Y.2d 498, 341 N.Y.S.2d 604 (1973). State court remedies have not substantially reduced detention times.

This is a situation where the federal court may dispense with the process of "waiting for Godot." *St. Jules v. Beto*, 462 F.2d 1365, 1366 (5th Cir. 1972). Individual cases might obtain relief in the state courts, for the New York Court of Appeals has recognized that a person may not be subjected to "a greater deprivation of personal liberty than is necessary to achieve the purpose for which he is being confined." *Kesselbrenner v. Anonymous*, 33 N.Y.2d 161, 350 N.Y.2d 889, 892 (1973). Individual action on behalf of hundreds of indigents has proved to be an ineffective remedy, however, in the state courts.

The hostility of New York State courts to class actions makes it impossible to obtain effective state relief where a large number of prisoners are suffering similar loss of rights. In *Gaynor v. Rockefeller*, 15 N.Y.2d 120, 256 N.Y.S.2d 584 (1965), the Court of Appeals sustained the dismissal of a class action by Negro citizens of New York against labor unions in the construction industry in spite of

> . . . a grave and continuing breach by the defendant unions of the laws and declared policy of this state against the reprehensible practice of discrimination on racial grounds in the area of employment and employment opportunity.

15 N.Y.S.2d at 128, 256 N.Y.S.2d at 589. See also *Hall v. Coburn Corp.*, 26 N.Y.2d 396, 311 N.Y.S.2d 281 (1970).

On the basis of the *Gaynor* case, a suit challenging state facilities for the treatment of the mentally retarded in the Buffalo area was dismissed on the ground that it was not a proper class action, although Mr. Justice Walter J. Mahoney had found that the problems of the named plaintiffs were

not unique but were comparable to those of hundreds of others. *Usen v. Sipprell*, 71 Misc. 2d 633, 336 N.Y.S.2d 848 (Sup.Ct. Erie Co. 1972), *rev'd*, 41 A.D.2d 251, 342 N.Y.S.2d 599 (4th Dept. 1973).

Professor McLaughlin in his *Supplementary Practice Commentary* on NYCPLR §1005, McKinney's Vol. 7B, pp. 74, 76 (cumulative Annual Pocket Part), stated:

> The Court of Appeals' most recent contribution to the law of class actions leaves the darkess largely unobscured. . . .
>
> These cases highlight the chaotic and incomprehensible state into which class actions have fallen in this state.

Class actions are as much of a burden to the federal courts as they would be to the state courts, but, in the language of Judge Jack B. Weinstein of this court, addressing a symposium of the Judicial Conference of the Fifth Circuit on the alleged abusiveness of class actions, 58 F.R.D. 299, 305 (1973),

> Either we are committed to make reasonable efforts to provide a forum for the adjudication of disputes involving all our citizens . . . or we are not.

Defendants contend that the relief requested is barred by *Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827 (1973). *Preiser*, however, merely held that the exhaustion requirement of 28 U.S.C. §2254(b) in a habeas corpus proceeding could not be avoided by labelling the proceeding as a civil rights action under 42 U.S.C. §1983. In the present case, however, the court has determined that, even if the case is properly cognizable only as a habeas

corpus action, the exhaustion requirements of Section 2254(b) have been met, to the extent of a showing that state remedies are ineffective.

Preliminary Injunction

In determining a plaintiff's right to a preliminary injunction, the court should consider the degree of likelihood of ultimate success on the merits, and the relative hardships to both parties. *Checker Motors Corp. v. Chrysler Corp.*, 405 F.2d 319, 323 (2d Cir.), *cert. denied*, 394 U.S. 999, 89 S.Ct. 1595 (1969).

The facts, developed at hearings which have been so extensive that they almost constitute the basis for a final determination, show that ultimate success on the merits is likely. The irremediable hardship on plaintiffs from prolonged incarceration is evident. The risk to the defendants and the public from the release of a dangerous defendant or one who may abscond, can be avoided by providing appropriate procedures and personnel to bring him to trial promptly.

Normally, a preliminary injunction is used to preserve the *status quo*, but sometimes a mandatory injunction is necessary where, as then Circuit Judge Taft stated in *Toledo A.A. & N.M. Ry Co. v. Pennsylvania Co.*, 54 Fed. 730, 741 (C.C.N.D. Ohio 1893),

> . . . it sometimes happens that the status quo is a condition not of rest, but of action, and the condition of rest is exactly what will inflict the irreparable injury upon complainant, which he appeals to a court of equity to protect him from.

The extent of amelioration of trial delays since the case began is not decisive on the right to a preliminary injunction. If the defendants in this case can show that the constitutional rights of pretrial detainees in Kings County are being protected when this case is ready for final decision on the merits, they may argue against the necessity of converting the preliminary injunction into a permanent one. This court should not delay, however, in enforcing the federal rights of such detainees at this time. The effect of the *Franklin* case on the question of abstention was treated in this court's memorandum of February 27, 1973 (p. 10), but what has already been said shows that this is not a proper case for abstention.

Dismissal of Indictments

Plaintiffs seek not only a prompt trial, but dismissal of indictments where a prompt trial is not granted. The latest rules on the constitutional requirement of a speedy trial were set forth in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182 (1972). One of the four factors enumerated in *Barker v. Wingo* is prejudice to the defendant. The Court recognized three aspects of prejudice, namely, oppressive pretrial incarceration, anxiety and concern, and possible impairment of the defense, and stated that the last was the most serious. The right to release relates to the oppressive character of pretrail incarceration and to anxiety and concern. The right to dismissal relates to the impairment of the defense. The degree of impairment of defense varies with the circumstances, more than the other aspects of prejudice. The oppressive character of prolonged incarceration does not differ vitally among different defendants, and therefore is particularly appropriate for relief in a class action. Without saying that a federal class action for dismissal of old indictments cannot be sustained under

proper circumstances, it appears to the court that dismissal is not appropriate preliminary relief in this action.

Possible Exceptions to the Proposed Order

There may be instances where there is a special reason for permitting a defendant to be confined more than six months before trial; for example, if he is charged with murder for profit. On the settlement of the order the court will consider whether any exception from the requirement of speedy trial should be made, and if so whether this should be by general sub-classes, or should be left to individual determination, and whether a federal court should be concerned with individual exceptions.

The speedy trial rule proposed by the Administrative Board of the New York Judicial Conferences in 1971 contained several exceptions, but they related to a ninety day limit on custody. This memorandum proposes a limitation which is really seven and one-half months between arrest and trial. Exceptions from such a rule are less justifiable.

A period of time should be granted for the state to confirm its procedures with the speedy trial requirements now being announced by this court.

The court will grant a preliminary injunction directing that all defendants who have been held in custody for more than six months without trial be brought to trial within forty-five days after a written request or released on their own recognizance, but providing that the order shall apply immediately only to defendants who have been held in custody for a year or more; that it shall apply forty-five days after this date to defendants who shall have been held in custody for nine months or more; and

that it shall apply ninety days after this date to all defendants who shall have been held in custody for more than six months. No bond should be required as a condition (F.R.Civ.P. 65(c)) to the preliminary injunction.

Settle order on three days' notice.

/s/ Orrin G. Judd
U.S.D.J.